

20 NOVEMBER1997

MEMORANDUM

Subj: USE OF CONTRACTOR PERSONNEL ON TECHNICAL EVALUATION
PANELS

I. ISSUE PRESENTED.

This Memorandum addresses whether contractor personnel may lawfully provide technical advice regarding the evaluation of technical proposals submitted to the government in response to a request for proposals (RFP). Furthermore, this Memorandum addresses some of the business considerations involved in deciding whether or not to use contractor personnel for such support.

II. BRIEF CONCLUSION.

Under certain circumstances contractor personnel may participate in the source selection process. The government should use contractor personnel in an advisory capacity and only when civilian and military in-house resources, including those available elsewhere in the government, are unavailable. Potentially serious conflict of interest issues are present and must be addressed. Finally, the regulations require specified approvals.

III. DISCUSSION AND ANALYSIS.

Government reliance upon the commercial sector for commercially available services is a topic of wide discussion, importance, and political sensitivity. On one hand, some espouse the position that the government should not be in the business of doing in-house that which can be out-sourced. That is a fundamental basis for commercial activities contracting (termed "A-76" after OMB Circular A-76). That emphasis is balanced against accepted policy that in-house personnel must perform the services when the government engages in decision-making.

The Office of Federal Procurement Policy (OFPP) Policy Letter 92-1, "Inherently Governmental Functions" (23 September 1992) discusses and balances these competing interests. Furthermore, a recent Federal Acquisition Circular (FAC) emphasizes the serious nature of the concerns this issue raises.

Analysis begins with two distinct, but related, concepts addressed by the regulations and instructions. The first concept is “inherently governmental functions.” The second concept is how the regulations and instructions regulate the use of Advisory and Assistance services (also known as Contracted Advisory and Assistance Services or Consulting Services¹). Finally, the analysis will progress to consider conflict of interest and non-disclosure issues.

A. Inherently governmental functions.

Contractors may participate as advisors and voting members on source “evaluation” boards, but may not be voting members of source “selection” boards. The evident distinction: In the first instance the contractor is not performing an “inherently governmental function.” See OMB Circular A-76, Appendices A and B.

The Federal Acquisition Regulations (FAR) expressly address the issue of contractor support in the evaluation of contractor proposals submitted in response to an RFP. FAR specifically states conditions for the use of contractors in this manner. FAR Part 37.2 addresses these services in the context of “advisory and assistance services” and states that:

Contractors may not be paid for services to conduct evaluations or analyses of any aspect of a proposal submitted for an initial contract award unless--

- (1) Neither covered personnel from the requesting agency, nor from another agency, with adequate training and capabilities to perform the required proposal evaluation, are readily available and a written determination is made in accordance with 37.204;
- (2) The contractor is a Federally-Funded Research and Development Center (FFRDC) as authorized in Section 23 of the Office of Federal Procurement Policy (OFPP) Act as amended (41 U.S.C. 419) and the work placed under the FFRDC's contract meets the criteria of 35.017-3; or
- (3) Such functions are otherwise authorized by law.

FAR 37.203(3)(d)[emphasis added]. Thus there is no doubt that per FAR Part 37.2, under certain conditions, contractors may conduct evaluations of contractor proposals.

Nothing in the FAR expressly addresses whether a support contractor may be a “voting” member of an evaluation team. The FAR does state, however, that advisory and assistance services shall not be “[u]sed in performing work of a policy, decision-making, or managerial nature which is the direct responsibility of agency officials.” FAR 37.203(c)(1)(emphasis added). FAR impliedly permits advising on source selection, but not decision-making regarding source selection. Therefore, as long as a technical evaluation panel is merely advising proper agency officials who retain their discretion to make decisions, contractors may vote on source selection evaluation boards. If, however, contractors are participating in a source selection board, they may only advise and not vote.

This view regarding the distinction between contractor roles (voting on source selection evaluation boards, and merely advising on source selection boards) is supported elsewhere in the FAR.

FAR 7.3 provides:

SUBPART 7.3--CONTRACTOR VERSUS GOVERNMENT PERFORMANCE

7.300 Scope of subpart.

This subpart prescribes policies and procedures for use in acquisitions of commercial or industrial products and services subject to (a) OMB Circular No. A-76 (Revised) (the Circular), Performance of Commercial Activities, and (b) the Supplement to OMB Circular No. A-76.

7.301 Policy.

The Circular provides that it is the policy of the Government to (a) rely generally on private commercial sources for supplies and services, if certain criteria are met, while recognizing that some functions are inherently Governmental and must be performed by Government personnel, and (b) give appropriate consideration to relative cost in deciding between Government performance and performance under contract. In comparing the costs of Government and contractor performance, the Circular provides that agencies shall base the contractor's cost of performance on firm offers.

Thus FAR relies upon, and endorses, OMB Circular No. A-76 when FAR charges the agency to ensure that only delegable functions are contracted out. The OMB Circular states at Appendix A of Appendix 5 an illustrative list of functions considered to be inherently governmental functions. This Appendix addresses our issue head-on and lists voting on source selection boards as an inherently governmental function that may not be delegated. Appendix A states:

The following is an illustrative list of functions considered to be inherently governmental functions:

...

12. In Federal procurement activities with respect to prime contracts,

...

(b) participating as a voting member on any source **selection** boards.

[Emphasis added.]

The FAR, through OMB Circular A-76, endorses the conditional use of contractors as long as contractors are not made voting members of source selection boards. Appendix B of Appendix 5 reinforces the advisory nature of a contractor's role in source selection by affirming that "Contractors' participating as technical advisors to a source selection board or participating as voting or non-voting members of a source evaluation board" are "not considered to be inherently governmental functions" that may not be contracted out (see paragraph 14 of Appendix B of Appendix 5 of OMB Circular A-76 [emphasis added]). (Although source selection boards are themselves only advisory boards to the source selection authority, OFPP in the above-cited Appendixes A and B treats source selection boards as if they are decision-making boards).

B. The Regulatory Hurdles for the Use of Contractor Support as Voting or Non-Voting Members of Source Evaluation Boards.

Agency use of contractor personnel in the source evaluation process (not the impermissible source selection process), although permissible, is highly regulated and controlled. For example, a generic support contract for these services cannot be used; this type of effort must be performed pursuant to a properly awarded Contracted Advisory and Assistance (CAAS) contract. Any government official who desires to use contractor personnel in the source evaluation process must become familiar with the applicable CAAS regulations, directives, and instructions. The applicable CAAS regulations and implementing instructions contain so many requirements that the confines of this Memorandum do not permit a complete recitation of all the requirements. The following is an overview of major constraints applicable to CAAS contracting, and that subset of CAAS contracting involving proposal evaluation.

FAR provides that before procuring general CAAS services, certain determinations must be made. In addition, the regulations impose additional requirements specific to CAAS contracts for source selection support.

1. FAR at 37.205 requires a 37.204 determination.

FAR 37.205 states that the “contracting officer shall ensure that the determination required in accordance with the guidelines at 37.204 has been made prior to issuing a solicitation.” FAR 37.204 states:

37.204 Guidelines for determining availability of personnel.

- (a) The head of an agency shall determine, for each evaluation or analysis of proposals, if sufficient personnel with the requisite training and capabilities are available within the agency to perform the evaluation or analysis of proposals submitted for the acquisition.
- (b) If, for a specific evaluation or analysis, such personnel are not available within the agency, the head of the agency shall --
 - (1) Determine which Federal agencies may have personnel with the required training and capabilities; and
 - (2) Consider the administrative cost and time associated with conducting the search, the dollar value of the procurement, other costs, such as travel costs involved in the use of such personnel, and the needs of the Federal agencies to make management decisions on the best use of available personnel in performing the agency's mission.
- (c) If the supporting agency agrees to make the required personnel available, the agencies shall execute an agreement for the detail of the supporting agency's personnel to the requesting agency.
- (d) If the requesting agency, after reasonable attempts to obtain personnel with the required training and capabilities, is unable to identify such personnel, the head of the agency may make the determination required by 37.203.
- (e) An agency may make a determination regarding the availability of covered personnel for a class of proposals for which evaluation and analysis would require expertise so unique or specialized that it is not reasonable to expect such personnel to be available.

2. FAR 37.204(d) requires a second determination per FAR 37.203.

If no executive agency personnel are available for a particular procurement, FAR 37.204(d) requires that the head of the agency make a

determination using the factors stated in FAR 37.203. FAR 37.203 considerations are as follows:

37.203

- (d) Limitation on payment for advisory and assistance services. Contractors may not be paid for services to conduct evaluations or analyses of any aspect of a proposal submitted for an initial contract award unless--
 - (1) Neither covered personnel from the requesting agency, nor from another agency, with adequate training and capabilities to perform the required proposal evaluation, are readily available and a written determination is made in accordance with 37.204;
 - (2) The contractor is a Federally-Funded Research and Development Center (FFRDC) as authorized in Section 23 of the Office of Federal Procurement Policy (OFPP) Act as amended (41 U.S.C. 419) and the work placed under the FFRDC's contract meets the criteria of 35.017-3; or
 - (3) Such functions are otherwise authorized by law.

3. DFARS and NAPS also specify other requirements:

The DFARS identifies the procedures to be followed in acquiring general CAAS services, and these requirements are set-forth in DoDD 4205.2, DoD Contracted Advisory and Assistance Services.² DFARS 237.205. Authority to approve the purchase of CAAS (AAS) has been delegated as follows pursuant to DFARS 234.206:

237.206 Requesting activity responsibilities.

- (c) The authority, without redelegation authority (see DoDD 4205.2), to approve the use of advisory and assistance services in contracts over \$50,000 is--
 - (i) An SES manager;
 - (ii) A general or flag officer;
 - (iii) An officer in 0-6 grade filling a general or flag officer level position;
 - (iv) An officer in 0-6 grade who has subordinate SES personnel.

NAPS 5215.608 provides that “contractor personnel shall not rank or recommend one proposal over another, assign any numerical scores or otherwise act in a decision making capacity.” NAPS goes on to require that a “written release shall be obtained from each offeror.” NAPS does not state what the content of such a release must be.

NAPS 5237.204 provides further and explicit policy regarding the required CAAS determination for use of contractor personnel as proposal evaluators. NAPS points out, among other things, that the timing of availability of other government personnel is a legitimate factor when determining whether other government personnel are “readily available.”

Particularly important, NAPS permits the Head of the Contracting Activity (HCA) to make the requisite determination set-forth in FAR. For determinations made prior to 1 October 1997, all copies of these determinations must be forwarded to ABM within five days.

4. SECNAVINST 4200.31C further implements the CAAS (Consulting Services) requirements.

As set-forth above, contractor support in the evaluation process can only be acquired through a contract for advisory and assistance services. SECNAVINST 4200.31C outlines in great detail how to obtain, fund, account for, report, and administer such a contract. Discussing all the details of this instruction is beyond the intended scope of this memorandum, however some general observations about SECNAVINST 4200.31C follow.

SECNAVINST 4200.31C states that CAAS is now properly renamed “Consulting Services” (CS). This may or may not be the case (see footnote 1). When this instruction refers to CS, the instruction refers to CAAS as defined in the higher order regulations and instructions. The terms CS and CAAS are synonymous.

SECNAVINST 4200.31C requires that “CS be procured by a separate contract action if possible.” SECNAVINST 4200.31C (7)(e)(1). The instruction further requires, among other things, that the requiring activity create a “certification . . . that such services have been reviewed for the most effective or efficient means of accomplishment.” SECNAVINST 4200.31C(7)(e)(2)(c). Presumably, this certification is a part of the determination required by FAR as discussed above.

SECNAVINST 4200.31C(9) further requires that SPAWAR appoint, as a collateral duty, a Coordinator for CS. There are many additional procedures and policies in this SECNAVINST that you must follow.

C. PROTECTING SPAWAR: CONFLICT OF INTEREST AND NON-DISCLOSURE PROVISIONS.

As a rule, the government considers source selection to be an inherently governmental function. See OMB Circular A-76. One of the reasons for this policy is that government personnel are relatively free from the influences of the competitive marketplace. To utilize contractor support, the government must put in additional protective measures to help ensure honest and professional technical evaluation results.

Two protective measures are required by SPAWAR Instruction 4200.26A. You must ensure that an organizational conflict of interest provision per FAR Part 9.5 is in your consulting services contract and applicable to the tasks under which you intend to acquire the technical evaluation services. Furthermore, the contractor and its personnel should sign a non-disclosure agreement to ensure that contractors do not abuse sensitive information learned during proposal review and evaluation. See SPAWAR Instruction 4200.26A(5.2.4.6). [This is in addition to the NAPS requirement, outlined above, requiring releases from offerors.]

III. CONSLUSION.

You may use contractor support to advise in the technical evaluation of contractor proposals provided that the services are acquired under a CAAS/CS contract and all appropriate determinations are made. Contractors may vote as members of an evaluation panel, but may not vote in the source selection process. In addition, to use contractors in this capacity, SPAWAR must employ proper releases, conflict of interest, and non-disclosure agreement provisions.

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¹ Federal statutes appear to use the terms “consulting services” and “advisory and assistance services” interchangeably. Public Law 102-394, Sec. 513 states “As used in this section, the term ‘consulting services’ includes any services within the definition of ‘Advisory and Assistance Services’ in the Office of Management and Budget Circular A-120, dated January 4, 1988.” Title 31 USC Sec. 1105(g) provides its own definition of advisory and assistance services by stating that:

(1) The Director of the Office of Management and Budget shall establish the funding for advisory and assistance services for each department and agency as a separate object class in each budget annually submitted to the Congress under this section.

(2)(A) In paragraph (1), except as provided in subparagraph (B), the term “advisory and assistance services” means the following services when provided by nongovernmental sources:

- (i) Management and professional support services.
- (ii) Studies, analyses, and evaluations.
- (iii) Engineering and technical services.

(B) In paragraph (1), the term “advisory and assistance services” does not include the following services:

- (i) Routine automated data processing and telecommunications services unless such services are an integral part of a contract for the procurement of advisory and assistance services.
- (ii) Architectural and engineering services, as defined in section 901 of the Brooks Architect-Engineers Act (40 U.S.C. 541).
- (iii) Research on basic mathematics or medical, biological, physical, social, psychological, or other phenomena.

The interchangeability of these terms must be appreciated as SECNAVINST 4200.31C (22 June 1993)(discussed later in this Memorandum) uses the terms “consulting services.”

² DoD Directive 4205.2 provides for significant specific budgetary, reporting, operating, and administration requirements. The following DoD CAAS procedures apply:

F. PROCEDURES

1. Identifying and Reporting CAAS

- a. The activity having the requirement for contractor support has the primary responsibility for the identification and reporting of CAAS.
- b. The requiring activity shall identify its CAAS requirements to the organization and/or functional area responsible for compiling the annual CAAS budget exhibit.
- c. The functional area and/or organization compiling the DoD Component's annual CAAS budget exhibit shall ensure that it is accurate, complete, and coordinated with the DoD Component's CAAS Director.
- d. When interdepartmental transfers of funds, such as a Military Interdepartmental Purchase Request or Inter-Agency Cost Reimbursable Order are used to procure CAAS, the organization issuing the funds, rather than the organization receiving the funds,

shall ensure the funds are properly reported in the DoD accounting system and CAAS budget exhibit.

e. In the instance where the requiring activity provides funding to another activity and may not have knowledge whether a specific requirement will be accomplished in-house or by contract, the organization placing the requirement is responsible for notifying the organization requesting the service whether the requirement was performed with in-house or contractor support to ensure accurate recording of obligation and expenditure information into the accounting system and CAAS budget exhibit.

f. Each proposed contract action shall be evaluated separately to determine if the services required meet the CAAS definition.

g. The DoD Component CAAS Director, during disagreement as to whether a specific contract action constitutes CAAS, shall make the final determination. This determination may be delegated.

2. CAAS Operating Plans

a. All DoD Components shall maintain CAAS operating plans. Operating plans shall be maintained at the appropriate organizational level as determined by the DoD Component CAAS Director.

b. CAAS operating plans shall be kept current at all times.

c. Details of the content and format of CAAS operating plans shall be determined by the DoD Component CAAS Director, but shall include as a minimum the following information for each ongoing and projected CAAS requirement:

1) Description of the requirement.

(2) Justification of the need.

(3) Estimated cost.

(4) Explanation of why contractual services are needed to satisfy the requirements.

3. Procurement and Contract Administration. The project office and/or officer, contracting officer's technical representative, and the contracting officer must all be involved in ensuring a successful procurement. The responsibilities and duties shift from one to another throughout this part of the overall process. The following guidelines apply:

a. CAAS should be procured through a separate contract action, if possible. When CAAS is a portion of a contract action, it shall be a separately identified contract line item number and separately priced.

b. Each purchase request package for CAAS, including task orders, shall include the following information:

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- (1) The type of CAAS being procured as defined by the CAAS reporting categories defined in enclosure 2. (The appropriate category shall be designated by the requiring activity to ensure proper accounting and/or object classification.)
 - (2) A statement of work describing in as clear and unambiguous terms as possible the work to be performed, the deliverable(s), and a specified period of performance.
 - (3) Certification by the requiring activity that such services have been reviewed for the most cost-effective or efficient means of accomplishment. If the requirement is being met with CAAS resources but is considered long-term and could be more cost-effective done by in-house resources, a statement citing action being taken to hire additional resources or an explanation of why contracting out is necessary shall be included.
 - (4) Procurement requests for studies must contain a statement that the DTIC and other applicable information sources have been queried and that no known existing scientific, technical, or management report could fulfill the requirement.
 - (5) Estimated cost and level of effort expressed in staff-years, staff-months, or staff-hours.
 - (6) Proposed evaluation and selection criteria for competitive awards.
 - (7) Surveillance plans specifying how contractor performance, performance standards, and deduction schedules, as required, shall be assessed.
 - (8) Properly chargeable funds certified by the cognizant fiscal and/or budget office.
- c. All CAAS procurement requests shall, as a minimum, be approved by an official at a level above the requiring activity. Additionally, approval for all CAAS procurement requests initiated during the fourth quarter of the fiscal year, for award during the same fiscal year, shall be by an official at a second level or higher, above the requiring activity.
- d. For proposed contract actions estimated at \$50,000 or more, the approval authority may not be delegated below: (1) An SES manager. (2) A general or flag officer. (3) An officer in the grade of O-6 filling a general or flag officer position. (4) An officer in the grade of O-6 who has subordinate SES personnel.
- e. All CAAS obligations shall be recorded in the accounting system of each DoD Component in accordance with DoD 7220.9-M (reference (j)).
- f. A file shall be maintained by the requiring activity to include a copy of the approved procurement request and appropriate supporting documentation, listing, or summary of contract items delivered, and documentation of Government acceptance.